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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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# No. 365

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JACK D'AGNA,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA

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**PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, CALIFORNIA AND BRIEF IN SUPPORT THEREOF.**

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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# No. 365

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JACK DRAGNA,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent*

---

## PETITION FOR WRIT OF CERTIORARI

---

*To the Honorable Fred Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:*

Jack Dragna, the above named petitioner, prays that a Writ of Certiorari be issued by this Court to review a judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, affirming a judgment of conviction of the Municipal Court, City of Los Angeles, County of Los Angeles, State of California; and in this behalf petitioner respectfully shows:

### Opinion of the Court Below

The Opinion of the Appellate Department of the Superior Court was rendered on April 25, 1952, and is reported in

the record at pages 357 to 360, and a Petition for Rehearing was denied May 5, 1952 (R. 377).

## I

### Summary Statement of Matters Involved

1. The Appellate Department of the Superior Court affirmed the conviction and sentence of petitioner on two counts of a complaint charging violation of Section 41.07 of Ordinance No. 77,000 of the Los Angeles Municipal Code of the City of Los Angeles, State of California, and Section 647 Sub-section 5, of the Penal Code of the State of California (R. 1).

2. The sentence affirmed was as follows:

> Thirty (30) days in the County Jail on Count I, and one hundred eighty (180) days in the County Jail on Count II, sentences to run concurrently (R. 2; 333).

That on June 5, 1952, the Trial Court on resentencing petitioner after the judgment was affirmed placed petitioner on summary probation for three years, and modified the jail sentence to thirty days on both counts to run concurrently.

3. The Complaint charged:

> Count I. ". . . on or about the 11th day of March 1951 . . . a misdemeanor, to wit: Violation of Section 41.07 of the Los Angeles Municipal Code (Ord. No. 77,000) was committed by . . . Jack Dragna . . . who . . . , did wilfully and unlawfully at and near 330 South Mariposa Street, in the City of Los Angeles, resort to a room for the purpose of having sexual intercourse and performing and participating in a lewd act with a person to whom the said Defendant was not then and there married." (R. 1.)
>
> Count II. ". . . on or about the 11th day of March 1951, at and in the City of Los Angeles, State of California, a misdemeanor, to wit: Violation of subdivision 5 of Section 647 of the Penal Code of the State of Cali-

fornia was committed by . . . Jack Dragna . . ., who at the time and place last aforesaid, was wilfully and unlawfully a lewd and dissolute person." (R. 1.)

This section of the Penal Code was attacked by petitioner as being repugnant to the due process clause of the United States Constitution and urged before the Appellate Department of the Superior Court (R. 342).

4. The evidence in support of these charges introduced by the prosecution disclosed the following facts:

(a) For eighteen months before the above criminal proceedings were instituted against petitioner, he was under police surveillance and that much of that time petitioner was under twenty-four hours a day surveillance (R. 97).

(b) That the police officers who were keeping the petitioner under surveillance under instructions and orders from their superior officer in the police department, broke into petitioner's abode at Los Angeles City address, 849 South Kenmore, which was a one-room apartment, sometime in 1950 and installed therein in an over-stuffed chair a mechanical listening device and connected the same by wire to a sound amplifying and recording machine in the basement of a neighboring apartment building, and by this process they assertedly made plastic tape recordings of this petitioner's conversations, both day and night, over a protracted period of time (R. 18); (R. 133); (R. 27, 28, 84, 182).

These tapes were not produced at the trial, the police asserting they had erased them after assertedly transmitting their contents to wax recording (R. 142; 200).

(c) That when petitioner changed his abode and moved to Los Angeles, city address 330 South Mariposa, in 1951, the Los Angeles Police Department repeated this procedure, and petitioner's home was again broken into (R. 18); (R. 133). Two mechanical listening devices were installed therein. One device was placed in a chair in petitioner's living room (R. 99). The other device was installed by the police officers in

the headboard of the petitioner's bed in his bedroom (R. 24, 25). One of these listening devices installed was connected by wires to a tape recording machine in a neighboring building (R. 19), and to the second listening device wires were connected which were strung and ran to an outside telephone pole where they dangled loose from the pole (R. 100).

(d) The police in autos stopped in the public street before the petitioner's abode, watched the activities of petitioner through spyglasses through his window (R. 19); (R. 29, 54); (R. 173) and connected up a listening device to the wires dangling from the pole to overhear petitioner's conversations and made tape recordings in the neighboring apartment of all conversations and sounds emanating from the petitioner's abode, making records of every intimate detail of petitioner's life (R. 173); (R. 104); (R. 114).

(e) The police shadowed petitioner constantly, placing themselves in a position to overhear conversations between petitioner and other persons in public restaurants and buildings (R. 39); (R. 41); (R. 43).

The police took photographs of petitioner dining in a public cafe (R. 51 (Peo. Ex. "A")).

The police harassed the petitioner, following him over the public highways in police cars (R. 40).

The police unlawfully arrested, held, and released the petitioner's son without cause (R. 101).

(f) That, over the specific objections and motions to strike of petitioner (R. 55 to 64, 69); (R. 147, 148); (R. 184; 203; 241) the trial court admitted testimony of police officers as to two or three asserted conversations between the petitioner and a woman in the abodes of petitioner above referred to, assertedly overheard by the police through the medium of the mechanical listening devices hereinbefore referred to (R. 69, 70, 77; 87, 95, 96; 190).

That these asserted conversations constituted substantially all the evidence in support of Count I and Count II charged in the complaint.

The rulings of the trial court on the objections of petitioner that the evidence was illegally obtained in

violation of petitioner's State and Federal constitutional rights were assigned as erroneous and were argued before the Appellate Department of the Superior Court as erroneous (R. 342; 345; 348) and considered by that court (R. 358), which held, "It is true that the evidence was obtained as the result of a flagrant violation of the principle that a man's home is his castle."

5. The trial court at the request of the prosecution instructed the jury as follows:

> "You are instructed that it is lawful for any (regular salaried) peace officer to install and use a dictograph in any house, room, or apartment, where (expressly) authorized by the head of his office or department, when such use or installation is necessary in the performance of their duties in detecting crime and in the apprehension of criminals." (R. 298; 321, 322).

This instruction was given by trial court by virtue of Section 653h of the Penal Code of the State of California. This instruction was urged before the Appellate Department of the Superior Court as erroneous and that Section 653h of the Penal Code of the State of California was in violation of and repugnant of the Constitution of the United States (R. 342; 345; 348; 349).

6. The Trial Court at request of prosecution when defining the offense of vagrancy upon which petitioner is being prosecuted (California State Penal Code Section 647 sub. 5) instructed the jury as follows:

> "You are instructed that Webster's Unabridged Dictionary defines dissolute as 'loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched." (R. 293; 319).

## II

### Jurisdictional Statement

The jurisdiction of this court is invoked under Section 1257 of Title 28 of the United States Code. Said judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles is a final judgment (Calif. Const. Art. VI Sec. 4, 4b & 5). That the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is the highest court of the State of California in which a decision of this case could be had (*Calif.* v. *Zook*, 336, U. S. 725, *Buck* v. *Calif.*, 82 L. Ed. 377 at 382). That your petitioner contends that he has been deprived of due process of law, all as guaranteed to him by the Fourteenth Amendment to the United States Constitution by the governmental agencies of the State of California in that:

(1) Petitioner's case was submitted by the prosecution to a jury in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California for a decision on the question of his guilt or innocence on misdemeanor criminal charges. That the evidence relied upon the support of petitioner's conviction was illegally obtained without a search warrant and as the result of an unreasonable search and through arbitrary intrusion by the local police into petitioner's personal privacy. (See Summary Statement of Matters Involved—Supra.)

(2) That Section 647, Subdivision 5 of the California State Penal Code, the provisions of which your petitioner was prosecuted for violating, is vague and uncertain in its effort to describe a public offense and affords no ascertainable standard of accountability, and your petitioner's prosecution thereunder was a denial to him of due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution. The interpretation of this offense the trial court gave the jury (at petitioner's trial) in

its charge to them (R. 293; 319) so broadened the scope of the statute to include innocent acts and made it more vague and uncertain, so that the enforcement of this statute against petitioner constituted a denial of due process of law, all as guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

(3) That Section 653h of the Penal Code of the State of California is an affirmative sanction by the legislative branch of the state government of California of illegal police incursion into petitioner's privacy, and constitutes a violation of the guarantee of due process of law as contained in the Fourteenth Amendment to the Constitution of the United States. The state trial court in giving an instruction incorporating the language of this code section (R. 298; 321, 322), and charging the jury that it was lawful for the police to install and use a dictograph in petitioner's home without his permission and solely upon the expressed authority of the head of the police department was a judicial sanction of a substantial violation of a personal right of this petitioner to be secure in his house against unreasonable search, which right is safeguarded by the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

That these rights under the Constitution of the United States as above enumerated were specially set up by your petitioner in the state courts.

## III

### How Federal Questions Raised in Trial Court

The stages in the proceedings in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California (the court of first instance) at which and the manner in which the federal questions sought to be reviewed were raised in that lower court are as follows:

(1) That the question of the introduction of the illegally obtained evidence as set forth in the next

preceding sub-paragraph (1) was raised by objection to its introduction on federal constitutional grounds during the course of the trial. (R. 147, 148); (R. 184, 203); (R. 241); and by motions to strike such illegally obtained evidence from the record after it was admitted by the trial court. (R. 147, 148); (R. 241).

(2) The giving of instructions by the trial court defining the offense of vagrancy as set forth in Section 647, Subdivision 5 of the Penal Code of the State of California (R. 293; 319); and (R. 319), was under Penal Section 1259 of the State of California, automatically deemed objected to by your petitioner in the trial court by virtue of the fact that substantial rights of your petitioner were affected thereby.

(3) The giving by the trial court of an instruction to the jury which instruction embodied the language of California State Penal Code Section 653h (R. 298; 321, 322) was automatically deemed objected to in the trial court under the provisions of California State Penal Code Section 1259 by virtue of the fact that the substantial rights of this petitioner were affected thereby.

## IV

### How Federal Questions Were Raised in Appellate Court

The state of the proceedings in the Appellate Department of the Superior Court, of the State of California, in and for the County of Los Angeles, at which, and the manner in which, the federal questions sought to be reviewed were raised are as follows:

(1) Your petitioner specifically assigned as error in the Appellate Department the overruling of petitioner's objections in the trial court to the introduction of evidence illegally obtained by the police in contravention of the petitioner's personal rights as guaranteed said petitioner by the Constitution of the United States. (R. 342); (R. 345); (R. 348).

(2) That your petitioner in his statement on appeal as an assignment of error asserted that Section

647, Subdivision 5 of the Penal Code of the Sta tate of California was a violation of due process of of law clause and in contravention of and repugnant t to the Constitution of the United States (R. 342). That at your petitioner further assigned as error the givin ing by the trial court of the dictionary definition of the e word dissolute as an instruction to the jury, said petiti itioner asserting such instruction was indefinite, confu nfusing and unintelligible. (R. 349).

(3) That your petitioner in his statement on ap- peal assigned as error the admission of evidenc nce ille- legally obtained by city police officers under c color of authority of Section 653h of the Penal Cod ode of the State of California because it was in contra traven- tion of the defendant's federal constitutional gua guaran- tee and in deprivation of defendant's civil ri rights. (R. 342; 345, 348).

## V

## Manner in Which Federal Questions Disposed of by Appellate Court

The manner in which the federal questions were so sought to be were passed on by the Appellate Department o of the Superior Court of the State of California, in and fo for the County of Los Angeles, was as follows:

(1) In regard to the constitutional question o of the production and admission at the trial of your ur petitioner of illegally obtained evidence, the Appe ppellate Department in its memorandum opinion declared red:

"It is true that the evidence was obtained a as the result of a flagrant violation of the principle t that a man's home is his castle. We do not interpret ret Section 653th, Penal Code, as authorizing that such uch was done, and know of no authority other than th that of expediency that justified it. The time may come ne when it will be held that evidence so obtained may n not be used in the courts of the states, as it is now be banned

from the federal courts. That is not now the rule in this state, however." (R. 358, 359).

(2) In regard to the question of the constitutionality of Section 647, Subdivision 5 defining the crime of vagrancy and the interpretation given it by the trial court in its instruction to the jury, the Appellate Department of the Superior Court declared:

"We are strongly inclined to the view that the word 'dissolute,' if given its dictionary definition, is too broad a word validly to create the crime of vagrancy. For example, a man may be 'unashamed' and yet not guilty of conduct that may lawfully be made a public offense. In upholding the constitutionality of subdivision 5 of Section 647, Penal Code, the court, in *People* v. *Babb* (1951), 103 Cal. App. 2d 326, 330, 229 P. 2d 843, 846, employed a more limited definition of the word 'dissolute'."

The Appellate Department of the Superior Court, however, went on to say that this erroneous instruction did not in their opinion prejudice your petitioner. (R. 359).

(3) In regard to the question of the constitutionality of 653h of the Penal Code of the State of California incorporated by the trial court in a jury instruction (R. 298, 321, 322), the Appellate Department of the Superior Court in its memorandum opinion declared:

"We do not interpret Section 653h, Penal Code, as authorizing that which was done, and know of no authority other than that of expediency that justified it". (R. 358).

Petitioner has specifically quoted from the memorandum opinion of the Appellate Department of the Superior Court of the State of California for loss of a clearer manner of presenting his complaint that he has been flagrantly deprived of due process of law as guaranteed him by the Fourteenth Amendment to the United States Constitution.

## VI

### Questions Presented

The questions herein presented are as follows:

QUESTION 1.

Does evidence obtained by local police in the State of California as the result of a "flagrant violation of the principle that a man's home is his castle", when admitted against a person in a criminal prosecution of the state court, constitute a denial to him of the guarantee of due process of law as contained in the Fourteenth Amendment to the United States Constitution?

QUESTION 2.

Is it a denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States to prosecute a person on and to enforce against a person a California State Penal Statute (Section 647, Subdivision 5) which is itself uncertain and made more vague and uncertain by a trial court's instruction to the jury that broadens the scope of such a penal statute to include innocent acts?

QUESTION 3.

Where a California state law (Penal Code Section 653h affirmatively sanctions arbitrary police intrusion into a person's privacy solely upon the express authority of the head of the Police Department or the District Attorney, does such a statute run counter to the due process guarantee as contained in the Fourteenth Amendment to the United States Constitution.

QUESTION 4.

Is the due process of law clause of the Fourteenth Amendment of the United States Constitution heedless of the manner in which evidence is obtained for use in state courts, or as otherwise stated, is a person de-

nied his federal constitutional rights to due process where the local police after extended and persistent surveillance and harassment of a person, under color of authority gathered from a statute such as Section 653h of the Penal Code of the State of California, subject a person within the State of California to the deprivation of his personal right to be secure in his home by breaking and entering the home without permission, or any judicial order, and installing and maintaining therein a dictagraph through which medium all conversations of such person over a period of months are recorded and used as evidence to convict him in a misdemeanor criminal prosecution in a state court?

## VII

## Reasons Relied upon for Issuance for Allowance for Writ

### Reason 1

That the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, in the instant case, decided a federal question of substance in favor of the respondent and against your petitioner as to said petitioner's constitutional guarantee of due process of law under the Fourteenth Amendment to the United States Constitution. The state court held in substance that due process of law is heedless of the means by which relevant evidence is obtained. That evidence obtained by the local police "in flagrant violation of the principle that a man's home is his castle" is properly admissible at the trial in the California State Courts and can be used to convict a person of a public offense, which decision is not in accord with the decisions of this court, including the case of *Rochin v. California*, 72 Supreme Court 205, 96 Lawyer's Edition, 154.

### Reason 2

That the Appellate Department of the Superior Court of the State of California, in and for the County

of Los Angeles, decided a federal question of substance involving the guarantee of due process of law as contained in the Fourteenth Amendment to the United States Constitution. The Appellate Department in its memorandum opinion held that petitioner's conviction under the provisions of Section 647, Subdivision 5 of the Penal Code of the State of California declaring every lewd and dissolute person to be a vagrant was sustainable even though the trial court in interpreting such vague and uncertain statute for the jury broadened its scope to include innocent acts and made the statute still more vague and uncertain. The said Appellate Department in effect ruling against petitioner's specific objection made to said court that through the statute and by the instruction interpreting the same your petitioner was denied due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution. That this decision of the State Court is not in accord with the decision of this Court, including the cases of *Stromberg v. California*, 283 U. S. 359, 75 Lawyer's Edition 1117; *Winters* v. *New York*, 333 U. S. 507, 92 Lawyer's Edition 840; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *L. Cohen Grocery Co.*, 225 U. S. 81, 65 Lawyer's Edition 516.

REASON 3

A decision of this court is necessary to determine whether a state statute (California Penal Code Section 653h) which affirmatively sanctions and allows the installation and use by the police of a dictagraph in a person's home without his permission when the District Attorney or Chief of Police expressly authorized such installation and use for the purpose of obtaining evidence to be introduced against such a person in a criminal prosecution is repugnant to and in contravention of the due process of law clause contained in the Fourteenth Amendment of the United States Constitution. That the decision of the Appellate Department of the Superior Court of the State of California, in and

for the County of Los Angeles on the foregoing proposition is not in accord with the decision of this court, including the cases of *Wolf v. Colorado,* 338 U. S. 25, 93 Lawyer's Edition 1782; *Steffanelli v. Minard,* 96 Lawyer's Edition 99.

Petitioner presents to this Court and files herein as an Exhibit hereto, a duly certified transcript of the entire record in the case as the same appears in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to the end that the errors aforesaid may be corrected by this Court.

JOHN WALSH,
*Attorney for Petitioner.*

RICHARD CANTILLON,
FRANK DESIMONE,
*Of Counsel.*

## BRIEF IN SUPPORT OF PETITION

### I

### Opinion of the Court Below

The memorandum opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is to be found at Page 357 to Page 360 in the record.

### II

### Jurisdiction

1. The judgment of the Appellate Department of the Superior Court to be here reviewed was rendered on April 25, 1952 (R. 360). A petition for rehearing which was duly filed was denied by the Appellate Department of the Superior Court on May 5, 1952 (R. 377). That on July 24, 1952 upon application duly made by your petitioner the Honorable Harold H. Burton, Associate Justice of this Honorable Court, made an order extending the time for filing a petition for a writ of certiorari in this court to and including September 30, 1952.

2. The jurisdiction of this court is invoked under Section 1257, Subdivision 3 of the Judicial Code. In the petition the requirements of Rule 12 (1) (Paragraph 3rd) are fully complied with and said petition contains a summary statement of the matters involved, and jurisdictional statement how the federal questions were raised in the trial court, how the federal questions raised in the Appellate Court and the manner in which the federal questions were disposed of by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

3. The petitioner was prosecuted based upon a complaint containing two misdemeanor counts (R. 1). Count One charged the petitioner with resorting to a room for the purpose of illicit sexual relations (R. 1). Count Two charged the petitioner with being a vagrant in that peti-

tioner is a lewd and dissolute person. All the evidence produced by the prosecution to support these respective charges was illegally obtained through a flagrant violation of the principle that "a man's home is his castle". This proposition is conceded by the Appellate Department of the Superior Court (R. 358), which held in effect that such evidence so illegally obtained was nevertheless admissible in the state court of California to support the conviction of your petitioner, and the Appellate Department ruled against objection and in so doing overruled petitioner's objection to said evidence on the ground that the admission of the same against him was a denial to him of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution (R. 358, 359).

Section 647, Subdivision 5 of the Penal Code of the State of California which is the Penal provision upon which count II of the complaint is based, simply declares every lewd and dissolute person to be a vagrant. This statute petitioner contended does not furnish a sufficient standard of accountability for the government of human conduct because it is by its terms too vague and uncertain, and a prosecution thereunder constitutes a denial to a person of due process of law (R. 319; 342). The Appellate Department of the Superior Court ruled against petitioner's contention (R. 359), which was squarely before that court on an assignment of error (R. 342). The jury instruction given by the trial judge defining the word dissolute so broadened the scope of the offense (violation of California State Penal Code, Section 647, Subdivision 5) so as to include innocent acts (R. 293; 319). This proposition was conceded by the Appellate Department (R. 359), which endorsed the constitutionality of the Penal Code Section and held that the definition given by the trial judge so broadened the language of the penal statute so as to include innocent acts did not prejudice the defendant or to in any effect deny him due process

of law as guaranteed by the Fourteenth Amendment of the United States Constitution (R. 359). That section 653h of the Penal Code of the State of California which the trial court considered as vesting the right in the local police to break into a person's home solely upon the express authority of the head of the Police Department (R. 298; 321, 322) and to install and use a dictograph in said home to hear and record all conversations and use them as evidence against your petitioner at his trial is in effect a state legislative sanction of police incursion into a person's privacy. The Appellate Department of the Superior Court overruled petitioner's objections and assignments of error based upon the unconstitutionality of this penal code section (R. 358, 359).

That all these federal questions were duly presented by petitioner in accordance with California state practice and procedure, and the same were presented for the decision of the highest court of the state having jurisdiction over the subject matter (R. 342, 345; 348; 349). A decision on these respective federal questions was necessary to a just determination of your petitioner's cause. It is apparent from the very nature of the federal questions raised in the memorandum opinion of the Appellate Department that the judgment as rendered by the Appellate Department could not have been given without passing upon these federal questions. That all of the matters above recited involve questions concerning the guarantee of due process of law as contained in the Fourteenth Amendment to the United States Constitution and as it related to the prosecution of your petitioner on criminal charges in the state courts of California.

4. The cases believed to sustain said jurisdiction are as follows: *Rochin* v. *California,* 72 Sup. Ct. 205, *Wolfe* v. *Colorado,* 338 U. S. 25, *Stefanelli* v. *Minard,* 96 Lawyer's Edition 99, *Connolly* v. *General Construction Co.,* 296 U. S. 385, *Lanzetta* v. *New Jersey,* 306 U. S. 451, *United States* v.

*Cohen Grocery Co.*, 255 U. S. 81, *Stromberg* v. *California*, 283 U. S. 359, *Herndon* v. *Lowry*, 301 U. S. 242, *Winters* v. *New York*, 333 U. S. 507.

## III

### Statement of Case

This has already been stated in the preceding petition for review by certiorari under paragraph I at Page 2 to Page 6 of said petition, which statement of the case is hereby adopted and made a part of this brief, by reference.

## IV

### Specification of Errors

1. The Appellate Department of the Superior Court erred in holding that evidence obtained as the result of "a flagrant violation of the principle that a man's home is his castle" is properly admissible in a criminal prosecution in a California state court and that such police practice is not repugnant or in contravention of the due process of law guarantee as contained in the Fourteenth Amendment to the Constitution of the United States.

2. Section 653h of the Penal Code of the State of California is a legislative sanction of arbitrary police incursion into privacy for the purpose of obtaining evidence for a criminal prosecution against a person without judicial authority and therefore, runs counter to the guarantee of due process of law contained in the Fourteenth Amendment to the United States Constitution, and the Appellate Department of the Superior Court was in error in failing to so hold.

3. That the Appellate Department of the Superior Court erred in holding that the manner in which relevant evidence is obtained for use in a state court

in a criminal prosecution is not within the purview of the due process of law clause of the Fourteenth Amendment to the United States Constitution.

4. That the Appellate Department of the Superior Court erred in not holding Section 647, Subdivision 5 of the Penal Code of the State of California as so vague and uncertain in its terms so that a prosecution thereunder in the state court constituted a denial of the guarantee of due process of law as contained in the Fourteenth Amendment to the Constitution of the United States.

5. That the Appellate Department of the Superior Court erred in not holding the jury instruction given by the trial judge defining the vague and uncertain statute creating the offense of vagrancy in such terms that it broadened the scope of the statute so as to include innocent acts and made said statute more uncertain, was a denial to your petitioner of due process of law, all as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

## Argument I

### Due Process of Law Is Not Heedless of the Manner in Which Evidence Is Obtained

The following argument supports the contention of petitioner under this specification of error number -1- and number -3-.

The Appellate Department of the Superior Court declared the evidence produced against petitioner at his trial was obtained as the result of a flagrant violation of the principle that a man's home is his castle (R. 358).

**The Fourteenth Amendment to the United States Constitution Provides That No State Shall Deprive Any Person of "Life, Liberty or Property Without Due Process of Law."**

The phrase "due process of law" as it applied to the use of illegally obtained evidence in criminal proceedings in the State of California has been limited to the right that the criminal trial be fair and impartial.

*People* v. *Gonzales*, 20 Cal. 2d 165.

The rule has been laid down repeatedly by the courts of California that they will not be concerned by the manner in which the evidence produced at the trial was obtained.

*People* v. *Mayen*, 188 Cal. 237;
*In re Polizette*, 128 Cal. 410;
*People* v. *LeDoux*, 155 Cal. 535;
*Herrscher* v. *State Bar*, 4 Cal. 2d 399.

The only exception that the courts of this state recognized to the above rule was in the case of confessions forcibly obtained.

*People* v. *Gonzales, supra*, citing:

*Palko* v. *Connecticut*, 302 U. S. 319;
*Chambers* v. *Florida*, 309 U. S. 227;
*Brown* v. *Mississippi*, 297 U. S. 278;
*Twining* v. *New Jersey*, 211 U. S. 78.

This exception exists in California, not because the confession was obtained in an illegal manner contrary to the immunities guaranteed a citizen by the "due process clause." It exists because such evidence so obtained is so unreliable that its use against a defendant in a criminal trial prevents the trial from being fair and impartial, and thereby denies to the defendant "due process of law."

*People* v. *Gonzales, supra.*

The second day of January, 1952, the Honorable Supreme Court of the United States expressly rejected the California rule that a defendant in a criminal case is only denied "due process of law" when the trial is not fair or impartial.

*Rochin* v. *California*, 7 Sup. Ct. 205.

The People introduced into evidence capsules containing morphine which were illegally sequestered from the abdomen of the defendant. There was nothing in the nature of the evidence itself, or in the manner in which it was obtained that rendered it so unreliable that its use at the trial would deprive the defendant of a fair and impartial trial.

*Rochin* v. *California*, 72 Sup. Ct. 205.

The United States Supreme Court did declare "*It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible* evidence is obtained." (Emphasis ours.)

*Rochin* v. *California, supra.*

The United States Supreme Court reversed the California judgment solely because of the manner in which the evidence was obtained when it stated that due process of law is a summarized constitutional guarantee of respect for those personal immunities so rooted in the traditions and conscience of our people as to be ranked fundamental and implicit in the concept of ordered liberty.

*Rochin* v. *California, supra.*

## Argument II

This argument is given in support of specification of error number 2.

Section 653h of the Penal Code of the State of California is repugnant to the due process of law clause of the Fourteenth Amendment to the United States Constitution.

Penal Code Section 653 (h) was in full force and effect at the time of the police incursions upon the rights of the defendant, guaranteed him under the United States Constitution and the California Constitution, and reads as follows:

> "653h. UNAUTHORIZED INSTALLATION OF DICTOGRAPHS: GRADE OF OFFENSE: PERSONS EXEMPTED. Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; *provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.* (Added by Stats. 1941, ch. 55, Sec. 1.) (Emphasis ours.)

The trial court instructed the jury as follows:

> "You are instructed that it is lawful for any (regular salaried) peace officer to install and use a dictograph in any house, room or apartment, where (expressly) authorized by the head of his office or department, when such use or installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals." (R. 298; 321, 322).

The United States Supreme Court has declared heretofore that:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is a basis to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such is enforceable against the States

throughout the Due Process Clause. . . . *Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.*"

*Wolf* v. *Colorado*, 338 U. S. 25;
*Stefanelli* v. *Minard*, 96 L. Ed. 99.

ARGUMENT III

Section 647, Subdivision 5 of the Penal Code is so vague and indefinite in its terms so that the prosecution of your petitioner thereunder constituted a denial to him of due process of law all as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

The argument is here made in support of specification of error number 4.

Section 647, Subdivision 5, as it pertains to the charge against your petitioner reads:

"Every . . . lewd or dissolute person . . . is a vagrant."

These terms are of themselves indefinite and uncertain and afford no ascertainable standard of guilt.

The United States Supreme Court has held that a person, who has been convicted of the violation of a statute so vague and indefinite in its terms that men of common intelligence must necessarily guess its meaning, has been denied due process of law within the meaning of the due process clause of the Fourteenth Amendment.

*Connaly* v. *General Construction Co.*, 296 U. S. 385;
*Lanzetta* v. *New Jersey*, 306 U. S. 451;
*United States* v. *Cohen Grocery Co.*, 255 U. S. 81;
*Stromberg* v. *California*, 283 U. S. 359 at 369;
*Herndon* v. *Lowry*, 301 U. S. 242 at 258.

## Argument IV

The jury instruction defining Section 647 Subdivision 5 of the Penal Code was erroneous and the giving of the same resulted in a denial of due process of law to your petitioner.

The argument here made is in support of specification of error number 5.

The trial court gave the following instruction:

> "You are instructed that Webster's Unabridged Dictionary defines dissolute as "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched" (R. 293, 319).

The Appellate Department of the Superior Court in its memorandum opinion declared the dictionary instruction given was too broad and that a man may be "unashamed and still not be guilty of a public offense" (R. 359).

The United States Supreme Court has refused to affirm a conviction under a statute which is itself uncertain when the court's interpretation makes it all the more vague and broadens its scope. The United States Supreme Court has stated that to enforce such a statute would be to deny the defendant due process of law because such a statute so interpreted leaves open the widest scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.

*Winters* v. *New York,* 333 U. S. 507.

Petitioner calls the attention of the Honorable Court that there is pending before it now a case involving the constitutionality of California State Penal Code, Section 647, Subdivision 5. (*Edelman* v. *People of the State of California.*)

**Conclusion**

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated: September 9, 1952.

Respectfully submitted,

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